

8-3100-7712-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Phillip A. McAfee,

Petitioner,

RECOMMENDED

ORDER

ON MOTION

vs
DISPOSITION

FOR. SUMMARY

City of St. Paul,

Respondent

By written Motion dated May 3, 1993, the City of St. Paul seeks summary disposition of the claim of Petitioner Phillip A. McAfee for veterans preference points regarding an appointment as an assistant city attorney for the City of St. Paul. The Petitioner filed a Responsive Memorandum and Supplemental Responsive Memorandum. The City filed a Memorandum in support of its Motion and also filed a Reply Memorandum and a Supplemental Reply Memorandum in support of the Motion. An oral argument on the Motion was held on May 7, 1993. The record on the Motion closed with the filing by the Petitioner of his Supplemental Memorandum in opposition to Respondent's Motion for Summary Disposition on May 26, 1993.

Appearances: Terry Sullivan, Assistant City Attorney, 345 St. Peter Street, Suite 800, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul (City or Respondent); and Alfred Standbury, Attorney at Law, 2209 St. Anthony Parkway, Minneapolis, Minnesota 55418, appeared on behalf of Phillip A. McAfee (Mr. McAfee or Petitioner).

Based on the written Motion and Memoranda of counsel,
with supporting
exhibits and affidavits, and on all the files and records
herein, the
Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Motion of the City of St.
Paul for the
summary disposition of the Petition of Phillip A. McAfee
for veterans
preference points with respect to the hiring of an assistant city
attorney be
GRANTED.

Dated this 2nd day of June, 1993.

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

For purposes of deciding this Motion for Summary Disposition, the Administrative Law Judge assumes that Mr. Phillip A. McAfee is an honorably discharged veteran of military service who would otherwise be entitled to the veterans preference points provided for by Minn. Stat. 197.455 (1992) in a governmental hiring situation. Mr. McAfee applied for a position with the City of St. Paul as an assistant city attorney. The position of assistant city attorney for the City of St. Paul is an unclassified position within the St. Paul City Civil Service System. St. Paul Code 5.03. Assistant city attorneys, however, may only be removed by the City Attorney after their first year of service in the manner provided for employees in the classified service. St. Paul Code, 5.03. The City admits that in filling the position of assistant city attorney, it interviewed applicants and made a final selection based on criteria as stated in the Affidavit of Elizabeth Nolen, dated May 17, 1993. The applicants were not given a formal civil service test, nor did the City apply veterans preference points in its final selection process. Mr. McAfee was not selected for the position. He filed a claim with the Commissioner of Veterans Affairs asserting that the selection process used by the City deprived him of his veterans rights, in violation of Minn. Stat. 197.455 (1992). The City argues that the position of St. Paul Assistant City Attorney is not a position to which the veterans preference law applies. The City asserts that the relationship between the city attorney and the assistant city attorneys is one of confidentiality and, therefore, subject to the confidentiality exception contained in Minn. Stat. 197.46 (1992). Mr. McAfee argues that the exceptions contained in Minn. Stat. 197.46 (1992), relate only to the discharge of a veteran and do not apply to the hiring process. The Petitioner, apparently argues that Hall v. City of Champlin 463 N.W.2d 502 (Minn. 1990), requires that all hirings for local

government be on the basis of a 100-point system, or its equivalent, to which veterans preference points can be added.

The request for summary disposition is analogous to a Motion for Summary

Judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same

standards apply. Minn. Rule pt. 1400.5500 K (1991). Summary disposition of a

claim is appropriate when there is no genuine issue as to an), material fact

and one party is entitled to a favorable decision as a matter of law.

Minnesota Rule of Civil Procedure, Rule

56.03. A material fact is one which

is substantial and will affect the result or outcome of the proceeding,

depending upon the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare 56 N.W.2d 804 (Minn. App. 1

984) , rev. den

February 6, 1985.

In considering the Motion for Summary Disposition, the

evidence must be viewed in the light most favorable to the non-moving party.

Grandahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herrid, 305 N.W.2d

337 (Minn. 1981); American Druggists Ins. v. Thompson Lumber Co. ,

349 N.W.2d

569 (Minn. App. 1989).

With a Motion for Summary Disposition, the initial burden is on the

moving party to establish a prima facie case for the absence of material facts

at issue. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

Here the state

has met its burden.

Minn. Stat. 43A.07 (1990);

Gorecki v. Ramsey County

437 N.W.2d 646 (Minn. 1989).

Once the moving party

has established a prima

facie case, the burden shifts to the nonmoving party. Minnesota Mutual Fire &

casualty Company v. Retrum 456 N.W.2d 71 9 , 723 (Minn. App. 1 990) . To resist successfully i motion for summary dispositi on, the nonmoving party must show t hat there are spec if i c f acts legiti mately in dispute which have a bearing on the outcome of the case. hunt v. IBM Mid America Employees Federal 384 N.W.2d 853, 855 (Minn. 1986); Carlisle v. City of Minneapolis 437 N.W.2d 712, 715 (Minn App 1 989) The nonmoving party may not rely on general assertions; s ign i f i cant probat ive ev idence mws t be of fered . Minnesota Rules of Civil Procedure, Rule 56.05; Carlisle v. City of Minneapolis supra ; Celotex Corp. v. Catrett , 47 7 U.S. 317, 32 2 - 2 3 (1986). The evidence introduced to defeat a summary disposition motion, however, need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715, citing Celotex Corp. v. _Catrett, 477 U.S. 317, 324 (1986). For the reasons hereinafter discussed, the Administrative Law Judge believes that thi s case is appropriately determined on a motion for summary disposition.

Mr. McAfee initially argues that the exceptions contained in Minn. Stat. 197.46 (1992), to the existence of veterans rights, do not apply to hirings under Minn. Stat. 197.455 (1992). In the opinion of the Petitioner, Minn. Stat. 197.46 (1992), which states the exceptions to the existence of veterans preference, was meant only to apply to a discharge situation in which an individual already holds his government employment. As pointed out by the city, however, Minn. Stat. 197.46, in establishing the exceptions, states:

Nothing in section 1 97 . 4 55 or thi s section shal I be construed to apply to position of pr iv a te secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding -a strictly confidential relationship to the appointing officer.

Minn. Stat. .5 197.455 (1992), referenced in
Minn. Stat. 197.46 (1992), is

the section which, by reference to Minn. Stat. 43A.11 (1992), establishes a veteran's rights with respect to hirings for governmental positions. It is clear, therefore, from the text that the exceptions stated in Minn. Stat. 197.46 (1992) apply to both discharge and to initial hiring under Minn. Stat. 197.455 (1992) and Minn. Stat. 43A.11 (1992).

That such is the law is apparent from even a casual reading of the governing cases. The Petitioner places prime reliance on Hall v. City of Champlin, 463 N.W.2d 502 (Minn. 1990), to establish his rights to veterans preference points in the hiring in question. In that case, however, the Supreme Court stated:

The 100-point rating system will apply to all positions except those specifically exempted from the veterans preference act by Minn. Stat. 197.46

3. Minnesota Statute 197.46 specifically exempts from the application of the Veterans Preference Act "the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department or [I any person holding a strictly confidential relation to the appointing officer.

463 N. W . 2d 502, 506 (Minn . 1 990) . This statement was made by the court in a case involving a hiring, not a discharge. The prime case relied upon by the Petitioner, therefore, specifically refutes his construction of Minn. Stat. 197.46 (1992), in a governmental hiring situation. The Court of Appeals in Hall v. city of Champlin, 450 N.W.2d 613, 615 (Minn. App. 1990), had reached the identical conclusion about the application of the exception stated in Minn. Stat. 197.46 (1992), to the hiring of veterans under Minn. Stat. 43A.11 and 197.455 (1992). In Winberg v. University of Minnesota 485 N.W.2d 325, 330 (Minn. App. 1992), rev'd on other grounds the Court of Appeals also applied the exceptions contained in Minn. Stat . 197.46 (1992), to the situation involving the hiring of a veteran.

The Petitioner has not stated any contrary authority for his proposition that even employees selected for a position holding a strictly confidential relationship to the appointing authority must be granted veteran!; preference points. The Administrative Law Judge, therefore, concludes that Mr. McAfee was not entitled to veterans preference points in this case if the position of assistant city attorney is within the confidential position exception stated in Minn. Stat. 197.46 (1992).

The Administrative Law Judge believes that the position of attorney to a governmental body involves a s t r i c t l y confidential relationship to the appointing authority, unless the nature of that relationship has been changed by placing the position wholly within the civil service system. In state -v. Peterson, 259 N.W. 696 (Minn. 1935), the court held that the position of attorney-inheritance tax examiner within the Office of the Attorney General involved a confidential relationship, exempt from the veterans preference law. Similarly, in Ulmer v. City of Duluth, 428 N.W.2d 855 (Minn. App. 1988), the court held that the position of assistant city attorney for the city of Duluth was a confidential position which did not afford the incumbent the

protections of the Veteran's Preference Act. In Ulmer, supra, the assistant city attorney served entirely at the pleasure of the city attorney without civil service rights in either hiring or discharge. In Bianco v. Mills, 80 N.W.2d 753 (Iowa 1957), the Iowa Supreme Court held that the position of assistant city attorney was not within the Iowa Veterans Preference Act, because the position involved a confidential relationship with the appointing authority. See. Krone v. Judicial Magistrate Appointing Commission 239 N.W.2d 562 (Iowa 1976) (Position of Judicial Magistrate confidential and not subject to veteran's act.)

The Administrative Law Judge is aware that the Minnesota Supreme Court, in State v. Mangni, 43 N.W.2d 75 (Minn. 1950), held that the veteran's law did apply to it civil service city attorney position within the Office of the Minneapolis City Attorney. In Mangni, Supra, the court held that the normal presumption of a confidential relationship between the attorney and the city attorney was negated by the fact that the city attorney had no control over either the appointment or discharge of assistants because the positions carried full civil service rights. The court relied on the fact that the Minneapolis City Charter and the Minneapolis Civil Service Commission rules gave the city attorney no voice in the selection of his first assistant. The court distinguished State v. Peterson supra. by stating that in that case the attorney general had complete authority to hire and discharge the individual involved, while in Mangni, supra, the Minneapolis City Attorney had no similar control. See, State v. Civil Service Board 32 N.W.2d 574 (Minn. 1948)(civil service attorney position affords protections of Veteran's Preference Act.)

The Administrative Law Judge invited comment by the parties on the application of 5.03 of the City Code to the issue of the existence of a confidential relationship between the city attorney and assistant city attorneys. Under that provision of the City Code, the city attorney may only discharge an attorney within his or her office for cause after that individual has served for a one-year period. It could be argued that this limitation on dismissal places the position of assistant city attorney in the City of St. Paul in a category more like Mangni, Supra, than Ulmer Supra.

The Administrative Law Judge believes that the relationship between the position of assistant city attorney in the City of St. Paul and the city attorney is a confidential relationship within the meaning of Minn. Stat. 197.46 (1992) and Minn. Stat. sec. 197.455 (1992). The city attorney in this case has retained complete discretion in the selection of individuals to fill the assistant city attorney positions. Moreover, tie or she has retained absolute discretion in discharging an individual, even without cause, during the first year of the tenure of the individual selected for the position. Therefore, it cannot be said that the city attorney has relinquished all control over selection or discharge so as to negate the existence of what would otherwise be a confidential relationship, as in Mangni, Supra. The discharge protections afforded assistant city attorneys after a one-year period do not negate the control that the St. Paul City Attorney has over the selection and initial tenure of his or her assistants. During the extended period of one year after selection, the city attorney can judge whether an individual can appropriately discharge the confidential functions of the position of assistant city attorney.

The Administrative Law Judge has concluded that a recommendation for summary disposition is appropriate. As a matter of law, the control that the city attorney exercises over the position of assistant city attorney in

selection and discharge within one year of appointment makes the position confidential within Ulmer v. City of Duluth, supra.

The Petitioner did not state any material facts regarding the position or the character of the duties that might require a hearing. As previously stated, to resist a motion for summary disposition, the nonmoving party must show that there are specific facts legitimately in dispute which have a bearing on the outcome of the case. *Hunt v., IBM Mid America Employees*, 384 N.W.2d 853, 855 (Minn. 1986). Mr. McAfee may not rely on general assertions; he must offer significant probative evidence to resist an otherwise appropriate motion for summary disposition. Minn. Rules of Civil Procedure, Rule 56.05; *Carlisle City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Petitioner has not made the requisite showing after the City established a prime facie case for summary disposition. The Administrative Law Judge, therefore, recommends to the Commissioner that he dismiss Mr. McAfee's veteran's preference claim.

JLL